



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 123 OF 2018

OMWANDA PATROBA OMORO.....1ST APPELLANT

NYANGUN WALTER.....2ND APPELLANT

VERSUS

ERICK NYAMARERI MOMANYI.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT AND DECREE OF HON. LUCY GICHEHA, SPM,

DATED 3RD AUGUST 2018 IN NAKURU CMCC NO. 846 OF 2016)

JUDGEMENT

1. The appellants were sued by the respondent who was involved in a road traffic accident with the appellant's motor vehicle registration No. KCD 771 V on 12th August 2015 along Geoffrey Kamau road within Nakuru town. The respondent who was a pedestrian was hit by the said motor vehicle and sustained serious injuries to wit; compound fracture of the right tibia fibula and soft tissue injury of the forehead and severe soft tissue injury of the right foot.
2. After full hearing of the matter the court found the appellants 100% liable and awarded the respondent Kshs. 750,000 as general damages, Kshs. 100,000 future medical expenses and Kshs. 38,740 as special damages as well as costs and interest at court rates.
3. Aggrieved by the judgement of the lower court, the appellants filed this appeal against the lower courts award on liability, quantum and damages for future medical expenses. The appellants asserted that the trial court's judgement was unreasonable, untenable and contrary to law.
4. They prayed that the appeal be allowed, the judgement /decree of the Honourable Court dated 3rd August 2018 be reviewed and/or set aside and be substituted with a judgement/decree that is reasonable and derivative of proper evaluation of evidence on record and that costs of this appeal be awarded to them.
5. Parties were directed to canvass the appeal by way of written submissions.

Appellant's Written Submissions

6. The appellants submitted that the accident involved motor vehicles KCB 771 V and KBK 879M according to the testimony of the police officer (PW3). The motor vehicle registration KBK 879 M was parked on the Highway contrary to traffic rules and regulations and more specifically Section 53 of the Traffic Act on obstruction. It was submitted that motor vehicle KBK 879 M deliberately obstructed the driver of motor vehicle KCB 771V.
7. The appellants submitted that the police abstract stipulates that the matter is pending under investigations. PW3 also testified that she was not the investigating officer but that she only received summons to appear before court.
8. The appellants relied on the **Civil Case No. 1225 of 1993 Rehma Odhiambo Marjan v Fanuel Obwaro & Another [1999] eKLR** and submitted that the two witnesses called by the respondent did not witness the accident, hence their evidence is not sufficient. They averred that if at all an accident occurred on the alleged date and time, then the same was solely and/or was contributed by the respondent herein and/or owner of motor vehicle registration number KBK 879M. Thus, the appellants urged this court to find liability in the ration of 50:50 between the appellants and the owner of Motor Vehicle registration number KBK 879M and the respondent herein.

9. The appellant submitted on quantum that a second medical report by Dr. AM Otara noted that the respondent had normal joint mobility along the planes of the Knee and classified the degree of injury as harm as opposed to Dr. Omuyoma's report which classified the injuries as grievous harm. The evidence on record shows that the respondent did not suffer as alleged and urged the court to find that Kshs. 750,000 on general damages is oppressive and excessive and such an award should be disturbed and a lesser amount be awarded.

10. The appellants placed reliance on various cases to wit; **Civil Appeal No. 147 of 2013 Said Abdullahi & Another v Alice Wanjira [2016] eKLR, Civil Appeal No.113 of 2006 Luke Osoro & Another v Daniel K Cheruiyot [2008] eKLR, Shree Enterprises (K) LTD & Another v Peter Ndirangu Kariuki [2010] eKLR** and submitted that the injuries in these authorities are graver than the injuries suffered by the respondent herein and urged this court to award general damages amounting to Kshs.300,000 as adequate compensation as the respondent's injuries were healed and he was back to his normal life.

11. The appellants contended that future medical expenses are in the nature of special damages and the same ought to have been specifically pleaded and proven. They submitted that the respondent had not discharged this burden when the trial court made an award under this head. They placed reliance in the case of **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR**.

12. The appellants also submitted that special damages must not only be pleaded but specifically pleaded. They urged the court to set aside the trial court's award on special damages and only award that which was pleaded and strictly proven. It was submitted that the trial magistrate erred in both law and fact by not considering the submissions and authorities tendered on behalf of the appellants in disregarding and/or dismissing all the legal principles and judicial precedents urged. They urged the court to set aside the judgement and allow the instant appeal with costs to the appellants.

Respondent's written submissions

13. The respondent submitted that the trial magistrate considered all factors in holding the appellants 100% liable. The respondent submitted that the evidence of the police officer (pw3) and the respondent (pw1) corroborated well as to the occurrence of the accident. This evidence was not challenged at all. The respondent urged the court to note that the evidence of pw3 is not hearsay rather what was recorded by the investigating officer in the police file.

14. It was submitted that the defence witness statement blames the third-party vehicle and not the respondent. The area where the accident occurred is within a town where the speed limit is capped at 50KPH but the appellant in his statement stated that he was driving at a speed of 80KMH indicating that the 1st appellant was over-speeding and that is the reason he couldn't control the vehicle. It was submitted that the respondent discharged his duty well in the trial court and the court was right in holding the appellants 100% liable.

15. It was submitted that the trial court used the right principles in assessing damages. The respondent's doctor prepared medical report and assessed 40% permanent incapacity, while the appellants' doctor confirmed the injuries sustained but failed to assess the cost of the surgical removal. The trial magistrate's award considered the respondent's injuries, inflation trends and passage of time. He placed reliance in the authority of **Charles Mwanja & Another v Batty Hassan (suing through his grandmother and next friend Safina Aly Sangila** where the court awarded Kshs. 800,000 for almost similar injuries. The respondent urged this court to uphold the award of Kshs. 750,000.

16. The respondent submitted that he had a plate in situ which needed to be removed and Dr. Omuyoma's opinion that the cost of removal was Kshs. 100,000 was not challenged hence the respondent prayed that the court upholds the award of the trial court of Kshs. 100,000 for future medical expenses. The respondent had pleaded Kshs. 38,740 for special damages and he produced receipts in support and he urged that the same be upheld. The respondent submitted that the trial magistrate applied the right principles in deciding this case and prayed that the appellants appeal be dismissed and costs of the appeal be awarded to the respondent.

Issues for determination

17. This being the first appeal, it is this court's duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

18. I have carefully perused the proceedings, the judgement, the record of appeal as a whole including the parties' submissions. The following issues fall for determination;

TE Whether the Trial court erred in holding the Appellant 100%liable for the accident

a) **Whether the Trial court erred in holding the Appellant 100%liable for the accident**

b) **Whether the learned magistrate awarded excessive damages in view of the injuries sustained.**

c) Whether future medical expenses and special damages were proved.

19. In addressing the complaints made by the Appellants over the trial court's finding on liability, it is important to weigh the same with the evidence on record.

20. The respondent called a police officer (PW3) who testified that the accident involved two motor vehicles KCB 771 V and KBK 879M. He stated that the driver of Motor vehicle KCB 771 V lost control, veered off the road and hit a stationary motor vehicle which had been parked along Midland Hotel off the road. According to the OB the pedestrian was standing along the road. The driver of KCD 771V was charged with careless driving. PW3 produced in court a police abstract which showed that the case is still pending under investigations.

21. The respondent also testified to the effect that he decided to go for lunch and he was walking on the right side of the road, when he was hit by motor vehicle at the pavement.

22. Given the foregoing summary of the evidence that was placed before the trial court, the magistrate found that the defendant was negligent. The court didn't find the third party negligent as it's motor vehicle was parked when it was hit by the defendant. The appellants contend that the third party's motor vehicle is to blame as it was parked in the high way and hence obstructed the motor -vehicles that were using the said road.

23. From the evidence on record, the third- party motor vehicle was parked off the road and not on the road as the appellants wants this court to believe. The respondent testified that he was going for lunch, meaning that it was broad day light and the driver of motor vehicle KCB 771 V was expected to see the road clearly, hence the assertion that motor vehicle KBK 879M obstructed the road users holds no water.

24. The appellant's motor vehicle was being driven from Nairobi towards Nakuru direction and the driver was expected to maintain the left side of the road. The respondent testified that he was walking on the right side of the road. Having swerved from the left side of the road to the right side of the road and to the pavement where the respondent was walking, meant that the appellant was on high speed and should have taken reasonable care and attention in order to avoid causing an accident. I find that the trial court's finding that there is no evidence that points out to how the third party motor vehicle contributed to the accident as it was parked off the road when the accident occurred was plausible. I therefore uphold the finding that the appellants were 100% liable for causing the accident.

(b)Whether the learned magistrate awarded excessive damages in view of the injuries sustained.

25. With regard to the appeal on quantum, the Appellants have submitted that the award of Kshs. 750,000/= was excessive in the circumstances taking into consideration the injuries sustained by the Respondent. The Appellants suggested that the court should make an award not exceeding Kshs. 300,000 whilst the Respondent maintained that this court should uphold the award made by the trial court.

26. The respondent's Dr. Omuyoma confirmed the injuries and opined that the respondent sustained a 40% disability while the appellants' Dr. Otara stated that the respondent suffered a temporary disability of 8 weeks. He also confirmed that the plate was still *in situ* and needed to be removed but failed to estimate future expenses. In his report Dr. Omuyoma confirmed that the respondent sustained Compound fracture of the right tibia and fibula, soft tissue injury of the forehead and severe soft tissue injury of the right foot.

27. Needless to say, it is now trite law that the Appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

28. The appellants in opining an amount of Kshs. 300,000 placed reliance in various authorities inclusive of the authority of **Shree Enterprises (K) LTD & Another v Peter Ndirangu Kariuki [2010] eKLR** where the respondent had suffered a compound fracture of the right radius and ulna, a fracture of the right scapula shoulder blade and soft tissue injuries of the right leg and scalp and was awarded Kshs. 300,000 in the year 2017.

29. The respondent also placed reliance in the case of **Charles Mwanja & Another v Batty Hassan (suing through his grandmother and next friend Safina Aly Sangila** where the respondent sustained bruises on the forehead, a wound on the right thumb and left wrist joint, a wound on the second right finger, fracture of the right tibia and fibula, a wound below the knee and a wound on the lateral aspect of the right ankle joint and the court awarded Kshs. 800,000.

30. I have considered the authorities cited by both parties, and noted that the awards were made in the year 2017 and the year 2008 respectively. Further the injuries therein were more severe than the ones the respondent herein suffered. Comparable injuries should be compensated with comparable awards. Even though the respondent's opined a 40% disability, he couldn't ascertain if the same had reduced over time. The appellants' doctor had indicated that the respondent had suffered a temporary disability of 8 weeks hence his injuries were not as serious to warrant a disability of 40%.

31. In the case of **Aloise Mwangi Kahari v Martin Muiya & another [2020] eKLR**, the appellant who suffered *Compound fracture of the right tibia and fibula, Severe soft tissue injuries on the face, Soft tissue injury on the left shoulder joint*, injuries which are more or less similar with the injuries suffered by the respondent herein was awarded Kshs. 500,000 in the year 2020.

32. Similarly, in the case of **Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR** the respondent who had sustained *Compound fracture of tibia and fibula bones of the right leg, Deep cut wound and tissue damage of the right leg, Head injury with cut wound on the nose, Blunt Chest injuries and Soft tissue injury on the lower left leg* was awarded **Kshs** 400,000 general damages in the year 2020.

33. In view of the foregoing authorities, this court finds that the sum of Kshs. 750,000 was on the higher side. Having found that the

appellant was 100% liable and considering the nature of the injuries viz a viz the cited authorities i find that an award kshs. 500,000 is reasonable in the circumstances.

34. The amount on future expenses should not be disturbed as both doctors confirmed that there is a plate in situ that needed to be removed.it is not entirely true as stated by the appellants that future medical expenses was not pleaded. The same was contained in the plaint and the doctor estimated the costs. In any event the fact that the metal was yet to be removed presupposed that he shall incur future costs.

35. The respondent also pleaded and proved special expenses as required by law hence the award in special damages is hereby upheld.

36. In the premises the appeal is hereby allowed as hereunder;

(a) The award of general damages of kshs. 750,000 is hereby set aside and substituted with an award of kshs. 500,000.

(b) The award of future medical expenses of kshs. 100,000 as well as special damages of kshs. 38,740 is hereby upheld.

(c) The sum total of kshs. 638,740 shall attract interest at courts rates from the date of the trials courts judgement till payment in full.

(d) The appellant shall have quarter costs of this appeal.

DATED SIGNED AND DELIVERED VIA VIDEO CALL AT NAKURU THIS 4TH DAY OF NOVEMBER 2021.

H K CHEMITEI.

JUDGE.